Supreme Court, U.S.
FILED
DEC 16 1996
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(3)

No. 96-758

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

ELEANOR TAYLOR

Petitioner,

vs.

McLENNAN COMMUNITY COLLEGE, ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Was summary judgment properly granted against the Petitioner on her retaliation and due process claims where competent evidence established that (1) the Petitioner was confrontational in her dealings with her supervisors and failed to follow rules and directives on a variety of matters ranging from travel authorization to hiring procedures; (2) the Petitioner failed to raise a genuine issue of material fact showing that the reasons given for her termination were pretextual; and (3) the Petitioner testified that she knowingly chose not to invoke her employer's grievance procedures to challenge the termination?

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RESPONDENTS' BRIEF IN OPPOSITION

The Respondents, McLennan Community College, Dennis Michaelis, Deborah Garrett, Richard Coronado, and Mike Jones respectfully request that this Court deny the petition for writ of certiorari, which seeks review of the Fifth Circuit's decision in this case. The decision of the Fifth Circuit is unreported and, under local Fifth Circuit rules, may not be cited as precedent.

SUMMARY

The Petition should be denied. This case involves the application of well settled rules of law to a particular set of facts. In an attempt to elevate this case into one worthy of review, Petitioner has disregarded large portions of the record and has ignored case law concerning the burden of proof in employment actions. This case ultimately turns on the routine application of Rule 56 of the Federal Rules of Civil Procedure, not on important issues of federal law. In the end, Petitioner merely is asking the Court to provide yet another level of appellate review to the district court's determination that Petitioner had failed to raise a genuine issue of material fact on essential elements of her claims.

The summary judgment evidence shows that, after her original supervisor retired, the Petitioner was confrontational with her new supervisors and was insubordinate on numerous occasions with regard to a variety of internal operating procedures. She violated college policy regarding fundraising on campus, disregarded rules for travel authorization, bypassed her direct supervisor on certain issues, submitted paperwork in an untimely manner, failed to follow college policy that required her to obtain the approval of the college president before hiring new personnel, and refused to use a competitive process to select candidates for her program, relying instead on word-of-mouth recruiting, which had a disparate impact on Hispanic individuals. This type of conduct eventually led to her termination. In the courts below, the Petitioner failed to raise a genuine issue of material fact indicating that the reason given for her discharge was pretextual or that any allegedly protected activity was a substantial or motivating cause of the discharge. In short, one may dispose of this case without reaching Petitioner's Questions Presented.

With regard to the Petitioner's due process claim, the evidence established that the Petitioner received notice of the charges; the gist of her complaint below was that she disagreed with the quality of the reasons that were given. The Petitioner also had an opportunity to contest her termination; she simply chose not to take advantage of it. The Petitioner admitted at her deposition that she had a copy of the College's grievance procedures but chose not to invoke them.

In short, the Petitioner merely disagrees with the specific application of the law to her own unique set of facts. The Petitioner offers no compelling basis for review of the decision below.

STATEMENT OF THE CASE

Proceedings Below

The Petitioner, Eleanor Taylor, filed suit on October 13, 1994 alleging that she was wrongfully terminated by her employer, McLennan Community College (MCC). Taylor asserted seven causes of action against the defendants following her termination. (R. 1-23).[1] She alleged that she was terminated because she is black and because she is female. She asserted discrimination claims under Title VII of the Civil Rights Act of 1964, the Equal Protection Clause pursuant to 42 U.S.C. § 1983, and 42 U.S.C. §§ 1981 and 1985. Taylor also alleged that she was retaliated against for having engaged in speech protected by Title VII and the First Amendment and that her termination was implemented without due process of law. Taylor alleged that she was discharged in retaliation for having filed a claim for workers' compensation benefits.

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[1]References to the Record are designated as "(R.__)."

Finally, she asserted a claim for intentional infliction of emotional distress under state law.

The Respondents Michaelis, Garrett, Coronado, and Jones moved for summary judgment on February 27, 1995, and MCC moved for summary judgment on May 22, 1995. (R. 103-269; 410-701). Taylor responded to the motions, and the Respondents replied. (R. 722-1454; 329-405).

The district court issued an extensive and thoughtful summary judgment opinion and order dismissing the Taylor's claims. (R. 1463-1520). Taylor filed a motion for new trial and a notice of appeal. (R. 1535). The district court denied the motion for new trial on August 16, 1995, and Taylor filed an amended notice of appeal. (R. 1563). The Fifth Circuit heard oral argument and rendered a written per curiam opinion on June 26, 1996. Taylor filed a petition for rehearing and a suggestion for rehearing en banc, both of which were denied. The decision of the Fifth Circuit is unpublished and, under local court rules, may not be cited as precedent. The district court decision also is unreported.

Statement of Facts

The Petition omits several important facts that are essential to understanding why the Petitioner was terminated and why this case is not worthy of review by the Court. Accordingly, the Respondents provide their own statement of the material facts as follows:

McLennan Community College (MCC) is a two-year college located in Waco, Texas. The Petitioner, Eleanor Taylor, was employed by MCC from 1980 until 1993. (R. 1191-1192). During the period relevant to this lawsuit, Taylor served as coordinator of Upward Bound, a federally-funded program that prepares disadvantaged high school students for college. (R. 1191-1192). At the beginning of the 1990-91

school year, Taylor reported to Dr. LaVerne Wong, vice president of student services. Dr. Dennis Michaelis, president of MCC, was concerned that too many individuals reported directly to Dr. Wong, and the student services area was restructured. (R. 424). Afterward, Taylor began reporting to Dr. Marylea Henderson, director of special services, who in turn reported to Dr. Wong. (R. 424). Taylor had acknowledged personality conflicts with Dr. Henderson. (R. 591).

Taylor, who is black, implies in the Petition that the assignment of Dr. Henderson, who is white, was racially discriminatory. At her deposition, however, Taylor admitted that she does not believe that this decision was racially motivated. (R. 621).

In August 1991, Dr. Wong retired and was replaced by Dr. Deborah Garrett, who was new to MCC, but had been the chief student services officer at her previous employer. (R. 593). Taylor had applied for Dr. Garrett's position, but was not selected. (R. 593). Unlike Dr. Wong, Dr. Garrett and Dr. Henderson, Taylor did not have a doctorate. (R. 1194).

Under Dr. Garrett's leadership, additional organizational changes in the student services division were made in the spring of 1992. (R. 500-507). Mike Jones, who is black, became Taylor's direct supervisor. (R. 424). His original title was director of admissions advising; after the reorganization, the position was renamed director of student and community relations, but no pay increase occurred. (R. 527). Because Jones' area was student recruitment and high school relations, Dr. Garrett concluded that it was logical for the Upward Bound program to be under his supervision. (R. 551). Taylor, who held a master's degree and once reported directly to the vice president, was insulted that she would have to report to Jones, a mere director who held only a bachelor's degree. (R. 527).

The record shows that the relationship between Taylor and her new supervisor, Jones, quickly became strained. A recurring issue was timeliness of paperwork. In one instance, Taylor left a travel request form after 5 p.m. for a trip scheduled to leave at 7 a.m. the next morning. Without prior approval, Taylor proceeded to take her personal car on the trip instead of riding the college-provided bus. She then requested reimbursement for the trip even though her personal car trip had not been authorized. (R. 662). On another occasion, her MCC corporate American Express card was canceled because she did not pay the bill on time. (R. 663).

Taylor resisted Jones' authority by refusing to meet with him when requested and by going over his head concerning the Upward Bound budget and other paperwork. (R. 527; 552; 659-660). On one occasion, when Dr. Garrett called a meeting with Taylor, Jones, and the Upward Bound staff, Taylor ordered Jones to leave the meeting because, in Taylor's opinion, the meeting did not concern him. Taylor also told Dr. Garrett that she could not talk to Upward Bound staff without her permission. (R. 552).

At her deposition, Taylor admitted violating a MCC policy that prohibited supervisors from on-campus solicitation of funds for off-campus groups. (R. 590). Taylor had solicited funds from staff and students, and a student's parent had complained. (R. 580-581; 585-590; 667). The college had to seek legal counsel to determine if Taylor's misconduct violated any laws. (R. 587). A meeting was held with Taylor to discuss her admitted violation. (R. 583). Rather than accept the situation for what it was, she decided this meeting was evidence of discrimination against her. (R. 582-583).

Taylor told her supervisors that she worked for the federal government and not MCC, and, therefore, was not obligated to comply with MCC procedures. (R. 529). College

officials were concerned enough to call and to visit in person with a representative of the U.S. Department of Education to determine whether Upward Bound was exempt from following MCC procedures. (R. 529). The officials were told that the program was not exempt and that Taylor was strictly an employee of the College. (R. 529).

The Upward Bound program served an equal mix of white, African-American, and Hispanic high school students. (R. 528; 552). The full-time staff for the program was entirely African-American. (R. 528). The part-time instructional staff was African-American and white. (R. 510; 528). At the time in question, Upward Bound had not employed a Hispanic instructor in six years. Taylor testified that the grant submission that she prepared encouraged the program staff to mirror the student population. (R. 744, Vol. 4, p. 133). The grant submission also stated that MCC would employ ethnic minorities and women at the same level of representation as the ethnic and gender composition of the labor force in the county and that MCC would advertise vacancies. (R. 528). MCC's affirmative action plan stated that, in programs with a deficient number of minorities, open recruiting and open posting will occur.[2] (R. 429-479). The affirmative action plan is a component of a statewide desegregation plan approved by the U.S. Office of Civil Rights. (R. 423, exhibit I).

The Petition correctly notes that one of the administration's concerns with Upward Bound was the absence of Hispanic instructors, but the Petition mischaracterizes the reasons for the College's concern. The College was concerned that Taylor used informal hiring procedures and obtained her

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[2]Contrary to the Petition, not a single passage in the MCC affirmative action plan imposes any racial preferences in hiring. (R. 423 exhibit B).

staff by word of mouth. (R. 607). According to Dr. Garrett's affidavit, the administration encouraged Taylor "to go beyond the same pool of individuals that she relied upon. We directed her to advertise in the hope of attracting qualified Hispanics." (R. 552). The goal was not to institute a racial preference or quota but to open up the selection process. (R. 552).

The Upward Bound self-study prepared by Taylor in 1990 expressly stated that the program would publicize all full-time and part-time positions throughout the city and state. (R. 744, Vol. 4, p. 137). Taylor admitted at her deposition that she had never used a competitive process to select Upward Bound instructors. (R. 744, vol. 4, pages 133-134).

A related issue was Taylor's failure to obtain the proper approval before hiring people. Taylor admitted that she had no authority to hire or fire subordinates. (R. 617). She conceded that all recommendations must go to the college president. Nonetheless, in 1990, before this dispute ever arose, Taylor "hired" instructors without seeking presidential approval. She turned in her "recommendations" *after* the individuals had begun working. As a result, Taylor's supervisor, Dr. Wong, was chastised by the college president who was concerned that the instructors had worked "for two weeks before I even saw them [employment forms]." (R. 510). His memo also expressed the concern that Taylor's selection method was unsuccessful in attracting Hispanic candidates: "I have signed the Employment Recommendation forms because I understand the need to get these folks in the classroom, but I do feel we must make every attempt in the future to see that broader ethnic representation be accomplished." (R. 510). Taylor admitted at her deposition that she failed to obtain presidential approval for her summer employment recommendations and that she was told by Dr. Wong to improve her recruiting efforts to attract Hispanic candidates. (R. 744, Vol. 4, p. 126-27).

In September 1991, Dr. Wong retired and was replaced by Dr. Garrett. Taylor continued to submit employment recommendations without having engaged in open recruiting. In May 1992, Taylor turned in her summer recommendations on the eve of commencement of the program. This time, Taylor's hand-picked slate of candidates was rejected, and Taylor was told that all of the positions would have to be advertised.[3] Taylor's original response to these directives was that she did not know that the positions should be advertised. Taylor did not characterize the advertising plan as "discriminatory" until a July 1992 memo, after Jones had warned her that her job might be in jeopardy. In this same memo, Taylor complained that "control" over employment "has been taken away from me." (R. 1210 exhibit 25 p. 11).

Although the rejection of Taylor's slate of candidates delayed commencement of the program, the delay was authorized by the U.S. Department of Education. (Garrett depo. at 129; Jones depo. at 228.) Despite the rejection of her recommendations, Taylor allowed five people she had "hired" to commence working. Because their employment had not been authorized by the college president, the employees were not paid until several months after the fact. (R. 529).

Jones objected to Taylor's "hiring" and wrote several memoranda expressing his dissatisfaction with her handling of the situation. He made several oral and written requests for information on the "volunteers" that Taylor had hired without authorization. (R. 535; 537; 541-542). Taylor alternately failed to respond, feigned ignorance, or responded by

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[3]The Petitioner suggests that the candidates she recommended were "continuing." At least two had not worked at the College during the previous year. (R. 1210 exhibit 2). Furthermore, none had any contractual entitlement to employment as a summer instructor. *Id.*

demanding that her supervisor provide a "written memo with a detailed explanation." (R. 536; 424; 509-510; 528-529; 602; 606). Taylor admitted that she employed the instructors without the required approval of the college president. (R. 603). On this issue, as with others, Taylor simply would not accept the established lines of authority.

In June 1992, Jones met with Taylor and wrote a memo to her concerning the chain of command, timely submission of program materials, cooperation, and hiring procedures. (R. 532). Taylor was warned that, if her performance did not improve, she would be terminated. (R. 532). She responded with a 13-page letter by certified mail. Taylor received other memoranda from Jones on July 14, 1992 and August 10, 1992 concerning the chain of command, timeliness of paperwork, communication, and recruiting. (R. 542, 546-547). Taylor made no assurances that her conduct would improve. (R. 1384-1396). Instead, Taylor would question Jones' abilities and place the blame for any problems on him. (R. 536; 543-545; 1384-1396). Memoranda over arguably mundane matters fill the record and demonstrate the strained relationship between Taylor and Jones.

Taylor's own affidavit acknowledges a communication problem. According to Taylor's affidavit, Jones allegedly told Taylor on June 24, 1992 that the college president said "'My priority right now is to pretty much follow the letter of the law and that means if we are going to advertise, we're going to advertise all these positions...'" Taylor allegedly responded: "Well, why didn't you call me and tell me well let's go back to square one this is not working... this would ease a lot of the tension and the misconceptions about what may be going on.... *It would not leave it to the mind to imagine. This is what I'm saying I mean we need to communicate.*" (R. 1210, exhibit 31; emphasis added). Jones' memo on August 10, 1992,

acknowledged that there had been "confusion" and that, henceforth, "we will follow established college personnel practices and work with the Personnel Office at MCC to employ diversified staff. This will provide us with an opportunity to look at a variety of applicants well in advance of our need." In Taylor's affidavit, she admitted that she was disciplined "because I did not advertise my part-time instruction positions in the Upward Bound Program." (R. 1194).

The positions eventually were advertised, but no qualified Hispanics applied. (R. 560A). Although no Hispanic was hired, the administration was satisfied that a good faith recruitment effort had been made. (R. 560A).

Taylor's willingness to distort certain facts is demonstrated by her statement in her first amended complaint that she was excluded from the staff selection process in the fall of 1992. (R. 9). At her deposition, she admitted that this allegation is a "half-truth" because she in fact was involved in the selection process. (R. 611-612).

In September 1992, Taylor signed a new employment contract for the term September 1, 1992 through August 31, 1993. (R. 551 exhibit A).

During the fall of 1992, Taylor's attitude toward Jones remained hostile. (R. 527-530; 1191-1217). On one occasion, she repeatedly called Jones' office over and over in a single day to find out the status of paperwork that had been submitted late for approval. (R. 530). On another occasion, Taylor dodged a meeting with Jones by announcing that she had just received an important telephone call from the Department of Education; Jones later learned from the department that the phone call had been pre-arranged. (R. 529).

In December 1992, Upward Bound was audited. (R. 498; 552). That month, Taylor, Jones, and the College internal

auditor met to talk about Upward Bound. Taylor admits that communication problems between Jones and Taylor was one of the key issues discussed with the auditor. (R. 578-579).

In December 1992, the same month as the audit, Taylor filed a charge of discrimination with the Equal Employment Opportunity Commission. (R. 1399-1404). On January 25, 1993, the College received a "blind" charge stating that an unnamed employee had filed a complaint. (R. 560A). None of the individual defendants knew that Taylor had filed a charge. (R. 452; 530; 553; 560A; 622-623).

In January 1993, during a building construction project, some toxic fumes allegedly were released. Jones testified that Taylor, in his opinion, had unnecessarily exposed her staff to risk of harm by ignoring his directive to leave the premises. (R. 549).

On February 2, 1993, Jones wrote a two-page memorandum to Dr. Garrett recommending Taylor's termination. He asserted that she had "made it a practice of being difficult if not impossible to work with," that she had repeatedly challenged his authority as her supervisor, and that she had been negative and hostile toward him and others. He noted that she had disobeyed directives concerning EEO hiring guidelines and that she had subjected her staff to possibly toxic fumes by refusing a directive to leave the premises. (R. 548-549). On February 11, 1993, Taylor was called into a meeting with Dr. Garrett and the personnel director. (R. 553). They advised Taylor that she was being terminated but would remain on the payroll until March 31, 1993. Taylor was informed that her termination was the result of her "repeated failure to adhere to college policies and directives and [her] continuing acts of insubordination." (R. 512).

Although Taylor remained on the payroll for nearly two more months, she never invoked any of the College's grievance

procedures. (R. 553; 626). (R. 481-483). Taylor testified in her deposition that she had an actual copy of these procedures but chose not to use them. (R. 624; 626). In July 1994, the EEOC determined that Taylor had *not* been subjected to any unlawful retaliation or discrimination. (R. 514-516). Taylor was later replaced by another African-American female, Brenda Wilkinson. (R. 1415-1417).

REASONS WHY THE PETITION SHOULD BE DENIED

A. *Standard of Review*

Rule 56 of the Federal Rules of Civil Procedure mandates the entry of summary judgment "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548 (1986). Although a court must give the party opposing summary judgment the benefit of all reasonably drawn inferences, this Court has stated that the party opposing summary judgment "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S. Ct. 1348, 1356 (1986).

B. Petitioner's Title VII retaliation claim:

The Petitioner failed to raise a genuine issue of material fact showing that the College's reasons for her termination were pretextual.

The Fifth Circuit affirmed the summary judgment against Petitioner because she failed to demonstrate that the College's "proferred reasons for her termination are

pretextual." (Petitioner's App. at 57.) Rather than address this issue, Petitioner engages in a lengthy discussion about whether her conduct was protected by Title VII. Petitioner's discussion is irrelevant. Even if an employee engages in a protected activity, an employer will not be held liable if the employee would have been discharged even in the absence of the protected activity. *Tanca v. Nordberg*, 98 F.3d 680, 681, 685 (1st Cir. 1996); *Maness v. Star-Kist Foods Inc.*, 7 F.3d 704, 707-08 (8th Cir. 1993), *cert. denied*, 114 S.Ct. 2678 (1993); *see also Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274, 287, 97 S.Ct. 568, 576 (1977).

A *prima facie* case of retaliation requires proof of (1) participation in an activity protected by Title VII; (2) an adverse employment action; and (3) a causal connection between the protected conduct and the adverse employment action. 42 U.S.C.A. § 2000e-3(a) (West 1995); *Holt v. KMI-Continental*, 95 F.3d 123, 130 (2nd Cir. 1996). Establishing a *prima facie* case creates an inference of discrimination. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 113 S.Ct. 2742, 2747 (1993). The burden then shifts to the employer to rebut the inference of discrimination by demonstrating a legitimate, nondiscriminatory reason for the action taken. The employer's burden is one only of production; it is not required to prove the *absence* of a discriminatory motive. 113 S.Ct. at 2747; *Holt*, 95 F.3d at 130. The burden of persuasion always remains with the plaintiff. 113 S.Ct. at 2747; *see also Purkett v. Elam*, 115 S.Ct. 1769, 1771 (1995) (burden of persuasion "never shifts" from the party alleging discrimination).

Once the employer has shown a legitimate, non-retaliatory reason, any presumption of discrimination disappears. *St. Mary's*, 113 S.Ct. at 2747 and 2749. The plaintiff then must demonstrate that the defendant's stated reason is pretextual and that, but for the protected activity, she

would have suffered no adverse employment action. *Ray v. Tandem Computers, Inc.*, 63 F.3d 429 (5th Cir. 1995); *Tanca*, 98 F.3d at 681, 685. The plaintiff ultimately must show that the reasons stated by the defendants are false and that discrimination was the real reason for her discharge. *St. Mary's*, 113 S.Ct. at 2749, 2751. Although the burden-shifting approach of *St. Mary's* and its predecessors is controlling, Taylor's Petition ignores it.

The Respondents presented a legitimate non-discriminatory reason for her termination: Taylor's lack of cooperation and refusal to follow directives or rules concerning numerous different matters. The burden shifted back to Taylor to establish that, but for some protected conduct, she would not have been terminated. *See Tanca*, 98 F.3d at 681, 685; *Pierce v. Texas Dept. of Criminal Justice*, 37 F.3d 1146, 1151 (5th Cir. 1994), *cert. denied,* 115 S. Ct. 1957 (1995); *see also St. Mary's*, 113 S.Ct. at 2749, 2751. The lower courts considered all of the summary judgment evidence and determined that Taylor had failed to raise a genuine issue of material fact on this element. The delay between Taylor's allegedly protected activity (July 1992) and her termination (February 1993) further discounted her argument of any causal connection between a protected activity and her discharge. *Cf. Valdez v. Mercy Hospital*, 961 F.2d 1401, 1403 (8th Cir. 1992) (no causal connection established where discharge occurred six months after protected activity); *Samuelson v. Durkee/French/Airwick*, 976 F.2d 1111, 1114-1115 (7th Cir. 1992) (time lapse between protected activity and adverse action discounted any causal connection).

In a last ditch effort to present this case as worthy of review, Taylor argues that the unreported decision below conflicts with a reported Ninth Circuit decision, *Moyo v. Gomez*, 40 F.3d 982, 984 (9th Cir. 1994), *cert. denied*, 115

S.Ct. 732 (1995). Interestingly, Taylor never cited *Moyo* in the court below in her principal brief or reply brief. Indeed, her argument below focused primarily on causation, not whether her activity was protected by Title VII. (Appellant's Fifth Circuit Brief at 45-46.) *Moyo* involved a prison guard who was terminated allegedly for opposing a prison practice that gave white inmates who worked in the prison preferential treatment over black inmates. The district court had dismissed the complaint under Rule 12(b)(6) for failure to state a claim, apparently on the ground that prison inmates are not "employees" for purposes of Title VII. The court of appeals reversed, holding that a person states a claim if he opposes a practice that he "reasonably believes" to be unlawful, even if it in fact was not unlawful. Although *Moyo* does state that opposition may include a refusal to perform an act, the decision below does not conflict with *Moyo*. The Fifth Circuit concluded that Taylor had failed to raise a genuine issue of material fact on the element of pretext, an issue not even addressed in *Moyo*. An additional distinction is that Mr. Moyo's case had been dismissed on the pleadings, unlike the case below, which was based on an extensive summary judgment record.

Taylor also asserts that the Fifth Circuit decision below conflicts with another decision of the Fifth Circuit, *Hopwood v. State of Texas*, 78 F.3d 932 (5th Cir.), *cert. denied*, 116 S.Ct. 2580 (1996). Taylor's argument does not justify review by this Court. First, it is the duty of the Fifth Circuit to maintain uniformity of the decisions from that circuit. Taylor sought--and was denied--*en banc* review of the panel decision below. (Petitioner's Appendix at 59.) Second, there is no conflict between the decision below and *Hopwood*. *Hopwood* involved an equal protection clause challenge to a formal institutional policy of racial preference in law school admissions. The

Hopwood court was asked to determine whether the policy was constitutional. In contrast, Taylor's lawsuit was brought as a challenge to her own termination, not as a challenge to MCC's hiring policies. Consequently, the Fifth Circuit did not decide whether the equal protection clause was violated in that regard. Finally, the Petition ignores the fact that the summary judgment in this case ultimately turned on Taylor's failure to raise a genuine issue of material fact tending to show that the Respondents' reasons for her termination were pretextual.

C. Petitioner's First Amendment Claim:

The Petitioner failed to raise a genuine issue of material fact tending to show that, but for her allegedly protected speech, she would not have been terminated.

The Fifth Circuit correctly determined that Taylor had failed to raise a genuine issue of material fact showing that any protected speech was a substantial or motivating factor in her termination. While the Petitioner disagrees with the lower courts' application of the law to her particular situation, she provides no compelling argument for review by this Court.

A First Amendment claim requires proof of three elements: (1) that the plaintiff's speech addressed a matter of public concern; (2) that her interest in speaking on the matter outweighed her employer's interest in promoting efficiency in the workplace; and (3) that her speech was a substantial or motivating factor in her discipline. *See Connick v. Myers*, 461 U.S. 138, 147, 103 S.Ct. 1684, 1690 (1983). Whether speech is protected by the First Amendment is a question of law. *Id.* at 461 U.S. at 147 n. 7, 103 S.Ct. at 1690 n. 7.

A public employee's speech is protected only if it addresses a matter of "public concern." Courts are required to

examine the *content*, *form*, and *context* of speech to determine if it addresses a matter of public concern. *Connick*, 103 S.Ct. at 1690. If the employee speaks in her role as an employee, rather than as a "citizen," the speech is not constitutionally protected. *See Connick*, 461 U.S. at 147, 103 S.Ct. at 1690; *Dodds v. Childers*, 933 F.2d 271, 273 (5th Cir. 1991).

Taylor alleged three instances of protected speech, two of which occurred more than two years prior to her termination. She alleged she and other employees criticized a racially offensive textbook in 1990; the book was removed. (R. 1192, 165). In 1991, Taylor spoke for 30 minutes to an Office of Civil Rights investigator who was investigating another employee's complaint. The Respondent Coronado had facilitated the meeting between Taylor and OCR. Taylor conceded below that the "essence" of her speech to OCR concerned her own personal situation (*i.e.*, the assignment of Dr. Henderson as her supervisor). (R. 1192). Taylor acknowledged that her two direct supervisors, Jones and Garrett, were not even employed by MCC when the speech in 1990 and 1991 occurred. (R. 767).

Taylor alleged below that the third instance of protected speech occurred in July 1992 when she wrote a memo about the plan to advertise Upward Bound positions. (Appellant's Fifth Circuit Brief at 34; R. 532-533; 541-542; 546-547). As previously noted, Taylor's original response to the advertising directive merely was that she did not know that the positions should be advertised. Later, after she was warned about possible termination, she criticized the directive and bemoaned the loss of "control" over the hiring of staff. (R. 1210 exhibit 25 p. 11). Taylor did not want Jones telling her how to run her program or interfering with her ability to hire people she knew. (R. 532-533; 541-542; 546-547). In responding to Jones's memorandum, Taylor was acting as an employee and

coordinator of Upward Bound, not as a private citizen. (R. 536; 543-545).

The analysis of whether Taylor engaged in protected speech ultimately is immaterial because, even if she did engage in protected speech, summary judgment was proper because Taylor failed to support the other elements of this claim. In particular, she failed to raise a genuine issue of material fact tending to show that, but for her alleged speech about discrimination, she would not have been terminated. (Petitioner's Appendix at 30-36 and 57.) In *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274, 287, 97 S.Ct. 568, 576 (1977), the Supreme Court held that a plaintiff must show that his protected conduct was a substantial or motivating factor in the adverse employment decision. The burden then shifts to the employer to show that the adverse decision would have occurred even in the absence of the protected conduct. *Id.* If the employer produces evidence of a non-discriminatory reason for the decision, then the employee must show that the reason is a pretext. *Coughlin v. Lee*, 946 F.2d 1152, 1157 (5th Cir. 1991). Public employees "ought not to be able, by engaging in such [first amendment protected] conduct, to prevent his employer from assessing his performance record and reaching a decision not to rehire on the basis of that record..." *Mt. Healthy*, 97 S.Ct. at 575.

More recently, this Court has acknowledged that the government "as employer" has broader powers than the government "as sovereign." *Waters v. Churchill*, 114 S.Ct. 1878, 1886 (1994). "When someone who is paid a salary so she will contribute to an agency's effective operation begins to do or say things that detract from the agency's effective operation, the government employer must have some power to restrain her." *Id.* at 1887-88. Employers may rely "on hearsay, on past similar conduct, on their personal knowledge of

people's credibility, and other factors that the judicial process ignores." *Id.* at 1888. Courts show great deference to governmental predictions of disruption in the employment setting. *Id.* at 1887; *see also Connick*, 461 U.S. at 151-52 ("when close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate.") Being rude, displaying negativism, and undermining supervisory authority are examples of potentially disruptive behaviors about which an employer legitimately may concern itself. *See Waters*, 114 S.Ct. at 1890-91. "When employee speech concerning office policy arises from an employment dispute concerning the very application of that policy to the speaker, additional weight must be given to the supervisor's view that the employee has threatened the authority of the employer to run the office." *Connick*, 461 U.S. at 153.

The summary judgment evidence showed that Taylor engaged in behaviors that her employer appropriately viewed as harmful to positive working relationships. Responding to her superior's office memo by certified mail return receipt requested is but one example of Taylor's hostility toward her superiors. *Cf. Connick*, 461 U.S. at 153 (citation omitted) (in assessing impact of speech, employer may consider not just the content but the "manner, time, and place" of the speech). Taylor failed to raise a genuine issue of material fact that her employer's reasons for the termination were pretextual. Finally, while Taylor has acknowledged that the college president, Dr. Michaelis, was ultimately responsible for her termination (R. 658), Taylor admitted in her deposition that she was not sure how he had violated her First Amendment rights. (R. 831).

In conclusion, the Petition raises no important issues of First Amendment law that require review by this Court.

D. **Petitioner's due process claim:**

The Fifth Circuit's disposition of Petitioner's due process claim is consistent with this Court's prior decisions and raises no significant issue of constitutional law.

Taylor asserts that she was deprived of a property interest without due process. Once again, the court below correctly stated the law; Taylor merely disagrees with the application of the law to her particular situation. Due process requires, before the final deprivation of a protected interest by state action, that the individual receive notice of the reasons for the action and an opportunity to be heard. *See generally Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893 (1976). The record shows that Taylor received notice and an opportunity to be heard.

The gist of her argument is that she *disagreed* with the reasons that were given and that she disagreed with the quality of the evidence supporting those reasons. (R. 532-533; 535-545; 1214-1215). Her disagreement with the reason does not change the undisputed fact that a reason was given. (Indeed, her December 1992 EEOC complaint shows that she was well acquainted with the reasons.) Due process is not concerned with the *merits* of an employment decision. *See Collins v. City of Harker Heights, Texas*, 503 U.S. 115, 112 S.Ct.1061 (1992).

The record also proves that Taylor had an *opportunity* to be heard before her termination took effect. (R. 481-494). Taylor testified that she knew about the available procedures, but that she *chose* not to use them. (R. 625-626). An employee who does not use available procedures cannot complain about the lack of an *opportunity* to be heard. *See generally Dusgnek v. Hannon*, 677 F.2d 538, 543 (7th Cir. 1982), *cert. denied*, 459 U.S. 1017 (1982) (due process is not violated when

procedures are available "and the plaintiff has simply refused to avail himself of them"); *Myrick v. Dallas,* 810 F.2d 1382, 1388 (5th Cir. 1987) (plaintiff cannot skip an available remedy and then complain about due process); *Russell v. Harrison*, 632 F.Supp. 1436, 1442 (N.D. Miss. 1986), *aff'd*, 815 F.2d 698 (5th Cir. 1987) (after being advised of their terminations, it was "incumbent" upon the plaintiffs "to initiate any review process").

Taylor's citation to *Cleveland Board of Education v. Loudermill*, 470 U.S. 550, 105 S.Ct. 1487 (1985), is completely misplaced. In *Loudermill*, the employees were fired and taken off the payroll in one fell swoop; a hearing on the terminations was not available until after a complete loss of pay. The Court was concerned that the employees' wages had been cut off before they had a chance to respond even minimally to the charges. The Court held that, before cutting off an employee's livelihood, some due process must be provided. Where a full post-termination hearing is available, the pre-termination due process may be informal. 470 U.S. at 545. In contrast to the *Loudermill* plaintiffs, Taylor remained on the payroll for more than 40 days after being notified of her termination. She had 40 days in which to request an administrative hearing to contest the decision. She had an *opportunity* to be heard; she simply did not take advantage of it. The Petition provides no compelling factual or constitutional reason to justify granting certiorari.

CONCLUSION

This is not a case involving questions of constitutional magnitude. It is a case about personality conflicts, turf battles, and chains of command. For all of the foregoing reasons, the petition for writ of certiorari should be denied.

DATED: December 16, 1996.

Respectfully submitted,

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